



Age Discrimination Amendment Bill 2006

Rosemary Bell
Law and Bills Digest Section

Contents

Purpose.	2
Background.	2
Age discrimination legislation	2
Use of the Act.	3
Recent age discrimination case	3
Exemptions from the Act.	4
Financial implications	5
Main provisions.	5
Amendments to Schedule 1 of the <i>Age Discrimination Act 2004</i>	5
Schedule 2 – Provisions of laws for which an exemption is provided by proposed subsection 39(1A).	7
Concluding comments	8
Endnotes.	8

Age Discrimination Amendment Bill 2006

Date introduced: 29 March 2006

House: House of Representatives

Portfolio: Attorney-General

Commencement: Royal Assent

Purpose

To amend the *Age Discrimination Act 2004* in order to specify a limited number of Commonwealth Acts and regulations that will include exemptions from the provisions of age discrimination legislation.

Background

Subsection 39(2) of the *Age Discrimination Act 2004* (the Act) provides for an exemption of all Commonwealth Acts and regulations for two years from the commencement of the Act. This exemption expires on 23 June 2006. The blanket exemption was made in order to provide time for Commonwealth Departments to review the age criteria in the laws and programs that they administer.¹

At the time the Act was passed, the Council on the Ageing commented on the width of the exemptions given to the Commonwealth, which they described as demonstrating the 'Commonwealth's own reticence in embracing its own age discrimination laws'. The Council expressed its concern that, by taking this approach, the Commonwealth 'provides a negative role model to the community'.² This Bill will reduce the number of Commonwealth laws and regulations that are subject to an ongoing exemption from age discrimination legislation.

Age discrimination legislation

The Commonwealth and all States and Territories have enacted laws that make discrimination on the grounds of age unlawful.³ Discrimination is defined to include both direct and indirect forms.⁴ Under Commonwealth legislation it is unlawful to discriminate against a person on the grounds of their age or age group in many areas of public life including employment, the provision of goods, services and facilities, education, accommodation, access to premises, and the administration of Commonwealth laws and programs. The Act is administered by the Human Rights and Equal Opportunity

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Commission (HREOC) where the Sex Discrimination Commissioner, Ms Pru Goward, is also the Commissioner responsible for Age Discrimination.

Use of the Act

The Act commenced in June 2004, and in the first year of its operation HREOC received 78 complaints. These made up six per cent of the total number of complaints handled by HREOC.⁵ Ten (or 13 per cent) of the complaints received under the Age Discrimination Act were from people aged between 15 and 24 years; eighteen complaints (23 per cent) were from people aged between 45 to 54 years; twenty complaints (25 per cent) from people aged 55 to 64 years; and a further ten complaints (13 per cent) from people aged older than 65 years.

Complaints relating to employment made up 73 per cent of the total. Other areas about which complaints were received included the provision of goods, services and facilities (18 per cent of the total), superannuation and insurance (3 per cent), and the administration of Commonwealth laws and programs (also 3 per cent).⁶ Forty nine complaints were finalised by HREOC during the first year of the Act's operation. Of these, twenty one were finalised through conciliation.⁷ Under the regulatory model established by the Act, the claims procedure starts with investigation and conciliation by HREOC and can progress to the Federal Court or Federal Magistrates Court for a hearing and enforceable remedies.

Recent age discrimination case

One case of alleged age discrimination has received considerable press attention recently. In October 2005, the Anti-Discrimination Tribunal Queensland found that older applicants for positions of flight attendants with Virgin Blue between 2001 and 2002 were treated less favourably than younger ones. The case arose when eight former Ansett flight attendants, aged between 36 and 56, applied for jobs with Virgin Blue during a 2001 recruitment drive. The Queensland Tribunal found that the eight women were not employed because young assessors unconsciously preferred people of their own age over older people in a workplace that encouraged 'youth and beauty', or 'Virgin flair'. Virgin flair was described as 'a desire to create a memorable, positive experience for customers. The ability to have fun, making it fun for the customer'.⁸ Tribunal member Douglas Savage SC said that 'inevitably a danger of employing the behavioural competencies system,⁹ especially as it required an assessment of 'Virgin flair' was to identify with persons of the same age and experience as the assessors, or what the assessors regarded as, if not of the same age, a 'fun' person. That person was I think likely to be a person of the same age, social class and life experience as the assessor'.¹⁰ He found that from September 2001 to September 2002 only one person aged 36 years was employed by Virgin Blue from over 750 people at or above that age who applied for a cabin crew position.¹¹ He found that while the assessment criterion was not biased, the assessors applying it were.¹²

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Exemptions from the Act

Differential treatment on the basis of age occurs in all areas of public life, and some of this treatment can be regarded as beneficial. Differential treatment on the ground of age that is not considered unfavourable is reflected in the various exemptions specific to age contained in anti-discrimination legislation. The Commonwealth Act already includes, in Division 4 of Part 4, a range of exemptions that make allowances for legitimate distinctions based on age. The Act permanently exempts acts done in direct compliance with a number of Commonwealth Acts and regulations,¹³ the administration of migration and citizenship legislation¹⁴ and membership of superannuation funds or schemes.¹⁵ In addition, when it passed in 2004, the Act included a two year exemption for anything done in direct compliance with any other Commonwealth Act or regulation.¹⁶ The purpose of this Bill is to specify which Commonwealth legislation is exempt from the provisions of age discrimination legislation, now that the two year exemption is due to expire on 23 June 2006. According to the Minister's second reading speech:¹⁷

[t]he bill is the result of a comprehensive assessment of Commonwealth laws and programs that examined their consistency with the Age Discrimination Act. As well as Acts and regulations, this assessment identified other instruments, schemes and programs that use age-based criteria for sound policy reasons. It also identified areas where the scope of the existing exemptions is uncertain or needs to be adjusted. The Bill addresses these additional issues.

In summary, the proposed exemptions in this bill cover acts done in direct compliance with specific Commonwealth Acts and regulations, or specific parts of Acts and regulations, relating to:

- certain Commonwealth employment programs (proposed section 41A)
- classification of films, computer games and literature (Schedule 2)
- the duration and cost of passports (Schedule 2)
- health insurance rebates (Schedule 2)
- the serving of documents (proposed subsection 39(9)), and
- eligibility for certain government programs (proposed subsections 41(2AA), 41(6))

Not all exemptions from age discrimination legislation are welcomed by the public. One item that has been commented on in the press,¹⁸ concerns the specific exemption for taxation laws provided by section 40 of the Act.¹⁹ Subsection 27F(1) of the *Income Tax Assessment Act 1936* (ITAA36) provides that workers over 65 who are made redundant do not qualify for the concessionally taxed component of a bona fide redundancy payout. Apparently the age clause was inserted into the ITAA36 in the mid-1980s as an anti-avoidance measure. 'It was designed to stop people who were simply retiring at pensionable age from accessing the tax-free redundancy payout'.²⁰ However, these days some workers are continuing to work beyond their 65th birthday and the Government,

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

when releasing its intergenerational report with the 2002 federal budget, said it wanted to encourage people to work as long as possible. A tax partner with KPMG, Martin Morrow, is quoted as saying '[t]hese people won't get the tax-free component unless that requirement in the legislation is changed'. David Deans, chief executive of Australia's largest seniors organisation, COTA National Seniors, is also reported as saying that the law did not reflect the changing workplace and that 'it certainly should be updated'.²¹

Financial implications

According to the Explanatory Memorandum, this Bill is not expected to have any financial impact.

Main provisions

The proposed amendments are dealt with in two Schedules. Schedule 1 provides an exemption for acts done in direct compliance with the whole of an Act, regulation or instrument. Schedule 2 is more limited. It lists the parts of Acts, regulations and other instruments where only specific provisions are exempted. According to the Explanatory Memorandum, '[p]rovisions are included in Schedule 2 where an exemption is warranted, but where it is not necessary or appropriate to exempt the complete Act, regulation or instrument that contains the provision.'

Amendments to Schedule 1 of the *Age Discrimination Act 2004*

Items 1 and 2 provide examples of positive discrimination meant to benefit young people.

Items 3 and 4 deal with superannuation. The purpose of **item 3** is to clarify the scope of paragraph 38(1)(a) of the Act, to make it clear that acts done in direct compliance with provisions that relate to superannuation, but are part of an Act that generally deals with some other subject matter, are exempt. The Explanatory Memorandum provides the example of the *Federal Court of Australia Act 1976*. **Item 4** expands paragraph 38(1)(b) of the Act to exempt acts done in direct compliance with a regulation or other instrument (or part thereof) that relates to superannuation, whether or not the Act that the regulation or instrument is made under is a Commonwealth Act relating to superannuation.

Item 5 inserts **proposed subsection 39(1A)** that provides for the inclusion of a new schedule of exemptions (Schedule 2). Schedule 2 will identify specific provisions of Acts, regulations and instruments. Acts done in direct compliance with those provisions will be exempt. Details of the provisions are provided in **item 15**.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 6 provides an exemption relating to the serving of documents. The intention is to allow other Commonwealth laws to restrict the service of documents to a person apparently of or above a particular age, most usually 16 years.

Items 7 and 8 address specific Commonwealth programs; in the case of **item 7**, the *Farm Household Support Act 1992*; and in the case of **item 8**, the *Veterans Entitlements Act 1986*. Both apply age criteria in dealing with who is eligible for benefits.

An exemption from anti-discrimination legislation is also provided for certain employment programs which use age based criteria (**item 9**). An exempted employment program is defined in **proposed subsection 41A(3)**. To be classified as exempt, an employment program must meet at least one of the five criteria enumerated in **proposed paragraph 41A(3)(b)**. An employment program is exempt when:

- one of the intentions of the program is to address a need of people in a particular age group
- the aim of the employment program is to alleviate the disadvantage of particular age groups
- there is a requirement that participants enter into a legally binding contract. It is government policy to protect young people under the age of 18 years from entering into contractual arrangements which may result in legal problems for them
- eligibility for the employment program is based on receipt of a particular Commonwealth benefit or allowance type, or
- an employment program is limited to people who are not eligible for particular allowances or benefits. The Explanatory memorandum gives the example of a program that may be delivered solely to people over 50 years, who are not in receipt of a benefit or allowance, in order to help increase their workforce participation.

Item 10 adds to Schedule 1 of the Act, four legislative instruments that contain age specific provisions. All deal with civil aviation and implement or reflect the international standards for aviation safety and practices prescribed under the *Convention on International Civil Aviation*. Similarly, two new items relating to the national classification scheme for films, computer games and literature are added by **item 11**.

Item 12 adds an exemption for acts done in direct compliance with determinations made under section 58B of the *Defence Act 1903*. These determinations deal with the pay and conditions of members of the Australian Defence Force and seek to limit the costs associated with adult children (over the ages of 18 or 21, depending on the circumstances) who choose to accompany a member of the Defence Force on posting, or to live in a home for which the member receives assistance from the Australian Defence Force.

Item 13 provides an exemption for acts done in direct compliance with seven Marine Orders made under the *Navigation Act 1912*, all of which include age based criteria. Most of them set minimum ages for obtaining certain qualifications or for employment on

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

vessels. According to the Explanatory Memorandum, each of the Marine Orders substantially reflects or implements existing or anticipated international obligations.

Item 14 removes the *Passports Regulations 1939* from Schedule 1 of the Act. The Regulations are no longer in force.

Schedule 2 – Provisions of laws for which an exemption is provided by proposed subsection 39(1A)

Item 15 inserts a new **Schedule 2** into the Act. This Schedule sets out the list of specific parts of laws mentioned in **proposed subsection 39(1A)**. Four of the provisions are designed to preserve the long service leave entitlements of former public sector employees whose employment was moved to the private sector under the following Acts:

- Australian Meat and Live-stock Industry (Repeals and Consequential Provisions) Act 1997
- Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000, and
- Pig Industry Act 2001.

The Explanatory Memorandum says that the specific provisions of these Acts are modelled on section 17 of the *Long Service Leave (Commonwealth Employees) Act 1976* which treats people with less than 10 years service differently, depending on whether they have attained the minimum retiring age when they cease employment.

Several other provisions deal with passports. Section 5.1 of the *Australian Passports Determination 2005* determines the length of time that an Australian passport is valid. Under the section, an ordinary adult passport is issued for a period of ten years. However, a person aged 75 or over can choose to apply for a passport of five or ten years validity. Section 5.1 also provides that passports issued to children are only valid for five years. This is to ensure that there will always be a sufficient resemblance between the child and their passport photo. Lesser fees are payable for passports that are valid for five years.

Another provision in **Schedule 2** deals with Parts 2 and 5 of the *Private Health Insurance Incentives Act 1998*. These parts provide for a private health insurance rebate of 35 per cent for people aged 65-69 years, and a 40 per cent rebate for people aged 70 years and over.

Regulation 8.10 of the *Workplace Relations Regulations 2006* establishes a minimum age of 18 years for a person to be appointed as a bargaining agent.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Concluding comments

Both major parties supported the substance of the Age Discrimination Act when it was debated in 2004. Failure to pass these amendments before 23 June 2006 would remove an exemption from age discrimination legislation that is proposed for some Commonwealth Acts, regulations, instruments, schemes and programs.

Endnotes

1. Revised explanatory memorandum, Age Discrimination Bill 2003, p. 15.
2. These comments are taken from the Council of the Ageing's Submission on the Proposed Introduction of Federal Age Discrimination Legislation given to the Select Committee on Superannuation and reproduced at Appendix Five of the Committee's report, *Planning for Retirement*, July 2003, p. 189. The Council of the Ageing's full submission on the legislation can be found at www.cota.org.au.
3. *Age Discrimination Act 2004* (Cth); *Discrimination Act 1991* (ACT), s. 7(1)(1); *Anti-Discrimination Act 1977* (NSW), Pt 4G; *Anti-Discrimination Act 1992* (NT), s 19(1)(d); *Anti-Discrimination Act 1991* (Qld), s 7(f); *Equal Opportunity Act 1984* (SA), Pt VA; *Anti-Discrimination Act 1998* (Tas), s16(b); *Equal Opportunity Act 1995* (Vic), s 6(a); *Equal Opportunity Act 1984* (WA), Pt IVB.

Under Commonwealth legislation there is a separate Act for each ground of discrimination, that is, age, sex (including marital status and pregnancy), race and disability. Each State and Territory has one Act under which it is unlawful to discriminate on a number of grounds.

Commonwealth age discrimination legislation is broadly consistent with state and territory laws. (See *Explanatory memorandum*, Age Discrimination Bill 2003, p. 21.) Section 12 of the Act generally provides that the Commonwealth Act will not limit or exclude the operation of state or territory age discrimination law.

4. Sections 14 and 15 define discrimination for the purposes of the Act. Direct discrimination is defined generally, as a person treated unfavourably on the basis of their age. Indirect discrimination is defined generally, as the imposition of a condition that has the likely effect of disadvantaging a person of the same age as the aggrieved person.
5. Human Rights and Equal Opportunity Commission, *Annual report 2004-2005*, p. 65. During the debate on the Act, it was anticipated that complaints made under the Age Discrimination Act would constitute ten per cent of all complaints handled by HREOC (see Senate Legal and Constitutional Legislation Committee, *Committee Hansard*, 9 September 2003, pp. 17–18.)
6. Human Rights and Equal Opportunity Commission, *Annual report 2004-2005*, p. 73.
7. *ibid.*, p. 74.
8. *Hopper & Others v. Virgin Blue Airlines Pty Ltd*, Anti-Discrimination Tribunal Queensland, 2005, p. 6.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

9. From the Court transcript it appears that applicants were asked to role play in a hypothetical situation and their behaviour in that situation was assessed.
10. *Hopper & Others v. Virgin Blue Airlines Pty Ltd*, Anti-Discrimination Tribunal Queensland, 2005, p. 15.
11. *ibid.*, pp. 11–12.
12. Jason Gregory, ‘Virgin ruling a victory for ‘older’ flight attendants’, *Courier Mail*, 11 October 2005, p. 3.
13. *Age Discrimination Act 2004* (Cth), ss 39(1), 41.
14. *Age Discrimination Act 2004* (Cth), s 43.
15. *Age Discrimination Act 2004* (Cth), s 38.
16. *Age Discrimination Act 2004* (Cth), s 39(2).
17. Hon Philip Ruddock (Attorney-General), ‘Second reading speech, Age Discrimination Amendment Bill 2006’, House of Representatives, *Debates*, 29 March 2006, p. 3.
18. Peter Weekes, ‘Tax slug awaits those sacked over 65’, *The Age*, 28 November 2005, p. 2.
19. Section 40 of the Age Discrimination Act refers to ‘taxation laws’ and includes both the *Income Tax Assessment Act 1936* (ITAA36) and the *Income Tax Assessment Act 1997* (ITAA97). The journalist writing the article may have been misled by the mention of ITAA97 in the Act and not realised that section 40 gives a specific exemption for taxation laws generally. The conclusion that ITAA36 is one of the Acts that has only a two year exemption from age discrimination legislation, is not correct.
20. Peter Weekes, ‘Tax slug awaits those sacked over 65’, *The Age*, 28 November 2005, p. 2.
21. *ibid.*

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

© Copyright Commonwealth of Australia 2006

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2526.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.